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In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1972

No. 71-1043

SAUL HELLER, *Petitioner*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*

On Writ of Certiorari to the Court of Appeals
of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Whether a prior adversary hearing must precede the seizure of a single copy of an obscene motion picture film is a question as sharply dividing state and federal courts in California as in New York. *Contrast People v. DeRenzy,* 275 Cal.App.2d 380, 79 Cal. Rptr. 777 (1969), and *Monica Theater v. Municipal Court,* 9 Cal.App. 7, 88 Cal. Rptr. 71 (1970), *with Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1970), *judgment vacated,* 401 U.S. 990 (1971), and *contrast People v. Heller,* 29 N.Y.2d 319, 327 N.Y.S.2d 678 (1971), *with Bethview Amusement Corp. v. Cahn,* 416 F.2d 410 (2d Cir. 1969).

California courts, like those of New York and many other states hold that a prior adversary hearing is not constitutionally required. *State v. Rabe,* 79 Wash. 2d 254, 484 P.2d 917 (1971); *South Florida Art Theaters, Inc. v. State ex rel. Mounts,* 224 So. 2d 706 (Fla. App. Ct. 1969); *Commonwealth v. State Amusement Corp.,* 248 N.E.2d 497 (Mass. 1969); *State v. Hartstein,* 469 S.W.2d 329 (Mo. 1971); *State v. Albini,* 285 N.E.2d 327 (Ohio 1972); *State v. Eros Cinema, Inc.,* 264 So.2d 615 (La. 1972); *People v. Johnson,* 185 N.W.2d 150 (Mich. Ct. App. 1970); *State v. Osborne,* 285 A.2d 43 (N.J. Super. Ct. 1971).

Federal appellate courts generally disagree. *Bethview Amusement Corp. v. Cahn, supra; Cambist Films Inc. v. Duggan,* 420 F.2d 687 (3d Cir. 1969); *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy,* 393 F.2d 202 (7th Cir. 1968); *United States v. Alexander,* 428 F.2d 1169 (8th Cir. 1970); *Demich, Inc. v. Ferdon, supra. Contra, Huffman v. United States,* ..... F.2d ..... (D.C. Cir. October 7, 1971); *United States v. Wild,* 422 F.2d 34 (2d Cir. 1969). *And cf. United States v. Cangiano,* ..... F.2d ..... (2d Cir. June 26, 1972); *Miller v. United States,* 431 F.2d 655 (9th Cir. 1970). Upon the resolution of this dispute depends the effective enforcement of state criminal obscenity laws.

Our state courts sanction a procedure different from that followed by New York authorities in this case. In California, after scrutinizing a detailed factual affidavit describing its content, a magistrate may issue a warrant authorizing seizure of a single copy of a film for use as evidence in a criminal prosecution.

Pursuant to the New York procedure under review a magistrate viewed the seized film at the theater. Our interest in upholding California's ex parte warrant procedure against the contentions that an adversary hearing must precede seizure or that the magistrate must view the film before authorizing seizure brings us before this Honorable Court as *amicus curiae.*

SUMMARY OF ARGUMENT

A magistrate's examination of a detailed factual affidavit describing content is sufficient judicial review to authorize the seizure of a single copy of an allegedly obscene motion picture film for evidentiary use in a criminal prosecution. This ex parte warrant procedure is especially appropriate where, as in California, a prompt adversary judicial proceeding is available immediately following seizure.

The prior adversary hearing requirement imposed by some federal appellate courts prevents effective enforcement of state criminal obscenity laws. If, under the First and Fifth Amendments, an exhibitor may be ordered to produce an obscene film for a prior hearing or for trial, there exists no adequate guarantee of compliance with such order. Prior adversary hearings will seriously deplete judicial resources.

California's ex parte warrant procedure is a constitutional alternative to the New York procedure under review, wherein a magistrate views a film be-

fore authorizing its seizure. If the Constitution demands that judges watch dirty movies, it does not require them to pay for the privilege.

ARGUMENT

A MAGISTRATE'S SCRUTINY OF A DETAILED FACTUAL AFFIDAVIT IS SUFFICIENT JUDICIAL REVIEW TO AUTHORIZE THE SEIZURE FOR EVIDENTIARY PURPOSES OF A SINGLE COPY OF AN OBSCENE MOTION PICTURE FILM.

A. California Procedure

Nonobscene movies, like books, are protected expression. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02 (1952); *Roth v. United States,* 354 U.S. 576, 581-85 (1957); *Landau v. Fording,* 245 Cal.App. 2d 820, 53 Cal. Rptr. 872 (1966). To insure adequate protection of nonobscene *literature,* this Court has ruled that an adversary hearing on the issue of obscenity must precede the seizure under warrant of *quantities* of books alleged obscene. *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964) (plurality opinion); *Marcus v. Search Warrant,* 367 U.S. 717 (1961).

However, this Court has never overlooked the practical differences between books and films, and has never equated the two forms of communication.

> "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." *Joseph Burstyn, Inc. v. Wilson, supra,* 503, quoted in *Times Film Corp. v. Chicago,* 365 U.S. 43, 49 (1961).

More recently, this Court reiterated that "films differ from other forms of expression." *Freedman v. Maryland,* 380 U.S. 51, 61 (1965). Because it is far more difficult for a magistrate to arrange or attend a film showing than to read a copy of a book obtained by the police, the procedures set forth in *Quantity of Books* do not apply to films.

Amicus contends that a magistrate's scrutiny of a detailed factual affidavit is sufficient judicial review to authorize the seizure for evidentiary purposes of a single copy of an allegedly obscene motion picture film. A corollary of our rule is that if an exhibitor possesses several copies of a single film, the police may seize but one; the exhibitor may, at the risk of violating state law, continue to screen the remaining copies. The purpose of the seizure is not to suppress free expression, but to preserve evidence necessary to convict those who violate state obscenity laws.

> "We believe this . . . [rule] to be a reasonable accommodation of the constitutional right of California to enforce a constitutionally valid criminal statute to the demands of the federal Bill of Rights. As required . . . it is 'designed to focus searchingly on the question of obscenity,' and it authorizes a restrictive procedure reasonably calculated to 'ensure against the curtailment of constitutionally protected expression.'" *People v. DeRenzy,* 275 Cal.App.2d 380, 386-387, 79 Cal. Rptr. 777, 780 (1969).

The ex parte warrant procedure is especially appropriate in California where statutory provision is made for a prompt post-seizure ruling on the legality of the seizure.

> " 'Where, as here, the seizure occurs under a warrant, an ex parte determination of the issue of obscenity, so far as probable cause is concerned, has taken place before the issuance of the warrant, and immediately after the seizure a determination of the issue to that extent can be obtained in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code.' " *People v. Luros,* 4 Cal.3d 84, 88, 92 Cal. Rptr. 833, 835 (1971).

Under California statutes[1] "a very prompt adversary judicial proceeding can be secured." *Monica Theater v. Municipal Court, supra* 9 Cal.App.3d at 14, 88 Cal. Rptr. at 80. No delay for notice or other purpose is incurred. While the time within which the magistrate must rule is not specified, "he will be aware of the prior restraint doctrine particularly applicable to films currently being shown and of the need to rule promptly in order to be in harmony therewith and not to jeopardize his ruling." *Ibid.*

Further, if the exhibitor does not prevail on the question of probable cause, he is entitled to a pretrial judicial determination of obscenity *vel non. People v. Noroff,* 67 Cal.2d 791, 63 Cal. Rptr. 575 (1967); *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 31 Cal. Rptr. 800 (1963); *Monica Theater v. Municipal Court,* 9 Cal.App.3d 7, 9 n.7, 88 Cal. Rptr. 71, 76 n.7 (1970); *Aday v. Municipal Court,* 210 Cal.App.2d 229, 26 Cal. Rptr. 576 (1962).

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[1]If the owner or exhibitor is prosecuted for exhibiting the film, he may proceed at once under Penal Code section 1538.5(a). If not made a defendant, he may proceed immediately under Penal Code sections 1539 and 1540.

B. Necessity for an Ex Parte Judicial Hearing Procedure

At stake is the State's right to enforce its anti-obscenity laws against exhibitors of unprotected obscene movies. It has been widely though not universally recognized that the State cannot expect the cooperation of commercial pornographers in surrendering their films for adversary hearings. Mr. Justice Harlan, dissenting in *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636, 638 (1968), observed that any procedure other than reliance on ex parte warrants would make adjudication of obscenity in the case of movies "quite impossible." In *People v. DeRenzy, supra* at 384, 79 Cal. Rptr. at 779, our intermediate state appellate court wrote that a prior adversary hearing requirement would mean that "enforcement of a state criminal statute must necessarily rest upon some chance windfall of evidence." "[B]y the time a hearing could be arranged after due notice to the potential defendant the film might no longer be in the possession of the potential defendant." *People v. Steinberg,* 60 Misc. 1041, at 1046, 304 N.Y.S.2d 858, at 863 (Westchester Cty. 1969). "It is fatuous to assume that the evidence would not be sold off or destroyed." *Rage Books, Inc. v. Leary,* 301 F. Supp. 546, 549, (S.D. N.Y. 1969).

Nor is there adequate guarantee that a film delivered for a prior adversary hearing will faithfully reflect what was previously exhibited. During the time elapsed between the service upon the exhibitor of a court order and production of the offending work at a hearing, the exhibitor may expurgate his

film and destroy crucial portions, or splice in socially redeeming frames. Such editing occurred in a case before this Court, *Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1970), *judgment vacated,* 401 U.S. 990 (1971).

> "There is a showing in the record . . . that the plaintiff Natali, admitted deleting portions of the film between the time it was seen by the officer and the time it was seized by the same officer. An affidavit by the officer stated that Natali deleted the most objectionable portions of the film." 426 F.2d at 647 (dissenting opinion of Carter, J.).

Some courts perceive constitutional impediments to prior adversary hearings. A California court has expressed the view that the state is powerless to produce the essential evidence at a hearing because "Any court process designed to compel production of the questioned material would obviously impinge on the possessor's Fifth Amendment rights." *People v. DeRenzy, supra* 275 Cal.App.2d at 384, 79 Cal. Rptr. at 779. *See also, Tyrone, Inc. v. Wilkinson,* 410 F.2d 639, 641 n.4 (4th Cir. 1969).

One federal court has suggested that a prior adversary hearing itself constitutes a prior restraint chilling First Amendment freedoms to the extent that "those seeking to regulate obscenity [must] devise . . . procedures . . . immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity." *Delta Book Distributors, Inc. v. Cronvich,* 304 F.Supp. 662, 667 (E.D. La. 1969).

Assuming that these practical and legal obstacles to a prior adversary hearing are overcome, other difficulties remain. The contours of such hearings being ill-defined, courts have been pressed to receive testimony from expert witnesses, evidence of community standards, and evidence of comparable works. Thus, a hearing intended to resolve a question of probable cause is expanded into a pretrial nonjury trial consuming days or weeks of court time and seriously disrupting dissemination of the questioned film. *See State v. Albini, supra,* 285 N.E.2d at 329 n.2.

Just as the prior adversary hearing procedure imposes an intolerable burden upon the prosecution, requiring a magistrate to view a film before authorizing a search warrant unnecessarily burdens the judiciary.

> "Must the magistrate at the beck of a policeman travel to the place of exhibition? If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction. No means appears by which he may be compelled to bring his film to the magistrate." *People v. DeRenzy, supra,* 275 Cal.App.2d at 387-388, 79 Cal. Rptr. at 781.

In *Lee Art Theater,* this Court recognized the difficulties inherent in compelling judges to view motion pictures prior to issuing warrants. 392 U.S. at 637. For this reason, perhaps, the Court refrained

from formulating such a rule. *Ibid.* Similarly, the Court need not and should not, in this case, invalidate California's ex parte warrant procedure by holding that the Constitution demands, alternatively, that magistrates patronize "art film" houses, or that the States not enforce their laws.

C. Analysis of Decisions Requiring Prior Adversary Hearings

In *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968), the Seventh Circuit applied to movies the rule announced for books in *Quantity of Books*. "We are bound . . .," the court said, by the teaching of *Quantity of Books*, "that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity." *Metzger v. Pearcy, supra*, 204.

By this *dictum* *Metzger* introduced into federal jurisprudence a conceptual error perpetuated in other federal appellate opinions. The "rule" of *Metzger* was *dictum* because the police there had seized *without warrant four copies* of the film, "I, a Woman," from separate theaters. This seizure could have been condemned on the ground that there was no prior judicial determination of any kind on obscenity. Moreover, this seizure, like the mass seizures in *Marcus* and in *Quantity of Books*, was intended to suppress expression.[2]

Metzger embodies two fundamental defects, each transmitted to its progeny: a failure to distinguish

[2] *Cambist Films, Inc. v. Duggan, supra*, and *United States v. Alexander, supra*, similarly involved suppression seizures.

between very different media of expression and the "peculiar problems" presented by each; *Joseph Burstyn, Inc. v. Wilson, supra* 343 U.S. at 503; and a failure to distinguish between a massive seizure designed to suppress a form of expression and a limited seizure of evidence necessary for a criminal prosecution.

Metzger and cases following it purported to be compelled by *Marcus v. Search Warrant,* 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). In *Marcus* police seized 11,000 copies of 280 printed publications. 367 U.S. at 723. The officers acted upon a warrant directing seizure of "obscene material" found within designated premises. The determination of what was "obscene" was left to the police. Subsequently, a magistrate ordered the return of copies of 180 publications found not obscene. *Id.* at 724. "Mass seizure . . . was thus effected without any safeguards to protect legitimate expression." *Id.* at 738.

In *A Quantity of Books,* a magistrate, following a 45-minute examination of seven novels, issued a warrant authorizing seizure of all copies of 59 different titles. 378 U.S. at 208. Officers executing the warrant impounded 1,715 copies of 31 listed titles. *Id.* at 209.

Neither *Marcus* nor *Quantity of Books* supports much less compels the Seventh Circuit *dictum.*

> "These cases are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceed-

> ings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe *Marcus* and *Quantity of Books* can be read to proscribe the application of ordinary methods of initiating criminal prosecution to obscenity cases." *United States v. Wild,* 422 F.2d 34, 38 (2d Cir. 1969).

The essential difference between a mass or suppression seizure and an evidentiary seizure, overlooked in *Metzger* was emphasized by this Court in *Mishkin v. New York,* 383 U.S. 502, 513 (1966):

> "Finally, while the search and seizure issue has a First Amendment aspect *because* of the alleged *massive quality* of the seizures, see *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 206 (opinion of Brennan, J.); *Marcus v. Search Warrant,* 367 U.S. 717, the record in this regard is inadequate. There is neither evidence nor findings as to *how many of the total available copies* of the books *in various bookstores* were seized. . . ." (Emphasis supplied.)

In *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), decided after *Metzger,* this Court declined to apply the *Quantity of Books* procedure to films, or even to require that a magistrate view a motion picture before authorizing its seizure. *Id.* at 637. *Lee Art Theater* thus confirms that the broad language of *Metzger* was not justified by this Court's decisions.

Metzger nevertheless has been followed by federal appellate courts as consistently as it has been rejected

by state courts. This divergence is not easily understood. Decisions adhering to *Metzger* fail to discuss the differences between books and films or to acknowledge openly the unacceptable consequences of prior adversary hearings. In place of critical analysis *Metzger* offers a simple doctrinal solution, perhaps irresistible in First Amendment cases. Clearly, the federal-state conflict does not arise from insensitivity to First Amendment rights on the part of California courts. *See, e.g., In re Giannini,* 69 Cal.2d 563, 72 Cal. Rptr. 655, (1968), holding topless dancing a form of protected speech.

There is a glaring internal inconsistency in *Metzger* and its offspring. The Seventh Circuit's order that the exhibitor must furnish the prosecution with a copy of the film seized cannot be reconciled with its broad language commanding adversary hearings prior to any restraint on dissemination. Other Circuit Courts have adhered to this procedure apparently intending to soften the blow to law enforcement. We do not understand how the condemned ex parte procedure more seriously disrupts dissemination than does the approved adversary proceeding. In either case the showing of the film will be halted if the exhibitor has but a single print but will not be interrupted if he has available a second copy. *Metzger, Tyrone, Bethview, Cambist,* and *Alexander* all stand for this proposition: Authorities may not seize a film without a prior adversary hearing, but they are entitled to a copy of it. We find this confusing. If the exhibitor is unable or unwilling to produce a copy of

his film, he will have to deliver to the prosecution the object of the improper seizure.

The folly of this situation was highlighted recently in *United States v. Cangiano, supra.* The Second Circuit there ruled that since ex parte warrant searches infringed First, not Fourth Amendment guarantees, seized material was not inadmissible in a criminal prosecution. Moreover, the court said, the government could retain samples of seized obscenity for evidentiary use at trial. *Id.* at ..... 11 Crim. L. Rptr. 2341, 2342 (1972).

This dilemma confronts the police: experience and common sense teach that exhibitors cannot be trusted to assist in their own prosecutions by furnishing copies of obscene films; federal appellate decisions teach that if the authorities make an ex parte warrant seizure either they may retain some of the fruits of their improper acquisition or the court, upon ordering the return of such material, will direct that copies be supplied to the government. This situation encourages lawless enforcement of the law.

CONCLUSION

The ex parte warrant procedure is one " 'designed to focus searchingly on the question of obscenity,' " *Lee Art Theater, Inc. v. Virginia, supra,* 392 U.S. at 637, thereby affording an adequate likelihood that nonobscene materials will reach the public. Where law enforcement officers invoke this procedure to

secure a single copy of a motion picture as evidence in a criminal prosecution, there is no substantial risk of suppressing protected speech. This Court should maintain its distinction between suppression seizures and evidentiary seizures.

The California procedure is a constitutionally permissible alternative to the New York procedure. The People of the State of California, therefore, respectfully urge the Court to affirm the judgment in *Heller v. New York* without holding that a magistrate must view a film before authorizing its seizure.

Dated, San Francisco, California,
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